BROWN V. COMMONWEALTH.*

Supreme Court of Appeals: At Wytheville.

June 21, 1900.

Absent, *Riely*, J.

1. TAXATION—*Merchant's license—Country produce—Place of business—Doing business—City ordinance—Roanoke city.* A merchant who has paid his license tax to the State for doing business at one point in the State is not required to take out an additional license for selling country produce acquired in his business at the market-house of a city in another portion of the State. The place occupied by him at the curb of the city market-house is not a place of business within the meaning of the statute. The statute contemplates a fixed place of business as a shop or store. Neither is such a sale "doing business in said city" within the meaning of the charter of the city of Roanoke, permitting the city to impose a license tax therefor.

TAXATION—*Doubtful powers—How resolved.* Laws imposing a license or tax are strictly construed, and all doubts as to the meaning or scope of such laws are resolved against the government and in favor of the citizen.

Error to a judgment of the Corporation Court of the city of Roanoke, rendered February 16, 1900, in two causes heard together by consent, one in the name of the *Commonwealth of Virginia* v. *W. C. Brown*, and the other in the name of the *City of Roanoke* v. *Same*.

Reversed.

Separate warrants were sued out in this matter, one in the name of the State, for a violation of the State law, and the other in the name of the city of Roanoke, for a violation of a city ordinance. The trials and judgments were separate, but the two appeals were heard together by consent.

Hansbrough & Hall, for the plaintiff in error.

Attorney-General A. J. Montague, for the Commonwealth.

C. B. Moomaw, for the city of Roanoke.

CARDWELL, J., delivered the opinion of the court.

W. C. Brown is a merchant in the county of Franklin, and has the license required by law for the privilege of doing business as a merchant in that county. In the course of his business he acquires by barter country produce, such as eggs, butter, fowls and vegetables,

* Reported by M. P. Burks, State Reporter.

which he often gathers up by sending his wagon around among his customers, and from time to time he brings the country produce, raised on his farm and acquired through his store, to the city of Roanoke for sale. Such produce is sold by him from his wagon on the city market, in accordance with the market regulations of the city, which regulations impose what is known as a curbage tax for the privilege of selling each load of produce on the market square, and confines the sale of such produce to the market square. On October 4, 1899, Brown came to the city of Roanoke with a wagon load of country produce, some of which was raised on his own farm and the balance was acquired by him in the course of his business. He paid the curbage tax required by the market laws of the city, and on the market square sold his load of produce to a merchant doing business in the city. After having sold his produce, he was cited to appear before the police justice for the city to show cause why he should not be fined for doing business as a merchant in the city without having first obtained a license from the city and from the State of Virginia to conduct such business. Upon the hearing of these warrants, the police justice dismissed them, holding that Brown was not conducting business in the city in such a manner as to make it necessary for him to obtain a merchant's license in the city. From this judgment the Commonwealth and the city of Roanoke appealed to the Hustings Court of the city, and, upon the hearing of the causes on appeal, the Hustings Court imposed a fine of $30 on Brown for the violation of the State license law and $2.50 for doing business as a merchant in the city without a license from the city.

By agreement, one bill of exceptions was taken to the rulings of the Hustings Court made applicable to both cases, and they are before us upon a writ of error awarded by one of the judges of this court.

We will first consider the question whether or not plaintiff in error, under the facts and circumstances stated, was required by the revenue laws of the Commonwealth to take out a merchant's license for the privilege of selling his country produce upon the market square of the city of Roanoke.

Section 549 of the Code requires that a merchant's license shall designate some definite place for the transaction of such business within the district of the commissioner granting the license.

The statute, imposing a license tax upon merchants, provides that the tax shall be graduated according to the amount of their purchases during the period for which the license is granted, and the section which fixes the amount of the tax declares that merchant tailors, lum-

ber merchants, furniture merchants, butchers, green grocers, hucksters, dealers in coal, ice, or wood, shall be embraced in that section; but, it further provides that nothing contained in the section shall be so construed as to require a license of any person who may canvass any county or corporation to buy lambs, pigs, calves, fowls, eggs, butter, and such like small matters of subsistence designed as food for man, unless such person shall keep a place of business for the purpose of selling such articles in or within half a mile of a city or town in the State. Secs. 27 and 28, chap. 244, Acts 1889–90. Sections 32 and 33 of that act also expressly provide that a pedlar's license shall not be required of any one for the privilege of selling or offering for sale family supplies of a perishable nature, farm products, wood or coal. And by an act approved March 3, 1896, Acts 1895–6, p. 685, it is declared unlawful for any city or town, or for any agent or officer of such city or town, to impose or collect any tax, fine or other penalty from any person selling their farm and domestic products within the limits of any such city or town outside of and not within the regular market-houses and sheds of such cities and towns.

It is, therefore, clearly the policy of the law to exempt persons who deal in country produce, as plaintiff in error does, from the payment of a license tax either as a merchant or as a pedlar, or any tax for buying or selling outside of the market of a city or town such produce. He does not come under the exception, in the statute above referred to, by keeping a place of business for the sale of country produce in or within a half mile of the city of Roanoke, but such sales as were made by him in the city of Roanoke were made from his wagon on the market square.

A merchant's license contemplates that the merchant is to have a fixed place of business within a county or city—a store or shop for the sale of goods. This is the common acceptation of the term as given in 2 Bouvier's L. Dic., p. 155. The same author defines the word "merchant" in its legal acceptation to mean one whose business it is to buy and sell merchandise, and says that it applies to all persons who habitually trade in merchandise. Neither in the legal or common acceptation of the word "merchant" was plaintiff in error conducting a mercantile business in the city of Roanoke when selling on the market square of the city from his wagon country produce, and therefore was not liable to a fine for doing business as a merchant in the city without having first obtained a license from the Commonwealth to conduct such a business.

It is claimed that sec. 104 of the charter of the city of Roanoke, Acts 1897–8, p. 549, furnishes authority in the city to impose a merchant's license tax upon plaintiff in error. This section, after specifying various kinds of business or employment upon which the city may levy a license tax, provides that a license may be required of any person whatsoever *doing business in said city*, whether the business or employment be of a like character or kind as that specially mentioned or not, and whether a license is required therefor by the State or not. Can it be said that plaintiff in error was doing business in the city of Roanoke within the meaning of the section? We think not. It is clear that selling country produce on the market of the city is not specially mentioned in the section, and the authority to impose a license tax for the privilege of conducting such a business must be derived, if at all, from the powers conferred in general terms.

Laws imposing a license or a tax are strictly construed, and whenever there is doubt as to the meaning or scope of such laws they are construed more strongly against the government and in favor of the citizen. *Supervisors* v. *Tallant*, 96 Va. 723.

Section 70 of the general ordinances of the city of Roanoke, like the statute of the State, imposes upon the merchant doing business in the city a tax graduated according to the purchases he makes in the conduct of his business, the tax imposed being the same as that prescribed in the statute, and concludes: "Dealers in dry goods, lumber, furniture, groceries, merchant tailors, or persons engaged in any other mercantile business whatsoever, and whether they be of like kind or class with those enumerated or not, except where otherwise herein specified, shall be embraced in this section."

Section 472 of the city's ordinances, pursuant to the authority expressly conferred in the city's charter, specifically imposes a curbage tax upon the sale of country produce at the city market, making no distinction between persons selling such produce of their own raising and persons who acquired such produce in other ways; and by section 474, the sale of such produce is confined to the city market.

Here, then, the city has confined the sale of country produce to the market square, specifically imposing a curbage tax for the privilege of selling it there; and in the case at bar, after this curbage tax had been paid by plaintiff in error, demand is made upon him for the payment of a license tax as a merchant in the city, on the ground, as counsel for the city contends, that when plaintiff in error came to the city and paid his curbage tax, he acquired a place to do business in

the city as a merchant, as fully and completely as any merchant in the city doing business in any of the houses in the city, etc. This position is wholly untenable. When occupying a space in the market, after paying the curbage tax, plaintiff in error was not there to buy and sell as is the business of a merchant, but merely to sell from his wagon his load of country produce, raised in part on his farm, and the residue bartered for or purchased in the course of his business in Franklin county, as he had the right to do, and when this was done, or the market hours closed, he abandoned the space in the market occupied by him and had no further right to occupy it. In no sense, therefore, was he doing business as a merchant in the city of Roanoke.

We are of opinion that the charter of the city does not authorize the imposition of a merchant's license tax in such a case, and that the common council of the city has not, by the ordinance relied on, attempted to impose the tax.

The judgment of the Hustings Court complained of will be reversed and annulled, and this court will enter such judgment as that court should have entered, dismissing the warrants against plaintiff in error, with costs to him as against the City of Roanoke.

Reversed.

FORMER JEOPARDY.

NOTE.—One act may violate e laws of two or more sovereignties. Here several offences are committed and hence jeopardy in one is no bar to a prosecution in another. *Moore* v. *Illinois*, 14 Howard, 13. Again, one act may violate several laws of the same sovereign. Thus a sale of liquor to a minor without license on Sunday. Here it has been held that *several* offences are committed, and that a conviction for a violation of one law is no bar to a prosecution for a violation of another law although there was but the one act. *Arrington* v. *Commonwealth*, 87 Va. 96. In this case there was a sale of liquor without license on Sunday. It was held that the conviction for selling liquor on Sunday was no bar to a prosecution for selling without a license. Again, the same act may violate a law of the State, and an ordinance of a municipal corporation of the State. As to whether or not two offences have been committed, the authorities are conflicting. One class of cases holds that two offences have been committed and that jeopardy in one is no bar to a prosecution by the other. *Ex parte Hong Shew*, 98 Cal. 709; *State* v. *Reid*, 115 N. C., and other cases from Indiana, Minnesota, Ohio, and South Dakota cited in Beale's Criminal Pleading & Practice, sec. 68. The other class holds that the municipality is the mere arm of the State in the enforcement of criminal laws and therefore punishment under one law is a bar to a prosecution under the other. *Hawkins* v. *People*, 106 Ill. 628; *People* v. *Hanrahan*, 75 Mich. 611, and *State* v. *Thornton*, 37 Mo. 360. These authorities are not at present accessible, but are taken from Beale's Crim. Pl. &. Pr., sec. 68. The facts of the cases cited are not known to the writer. He suggests, however, that *possibly* the two classes of cases may be reconciled. If the act is *malum in se*, for instance,

assault and battery, then the municipality is an arm of the State for its suppression and punishment, and a conviction or acquittal by one should bar a prosecution by the other; but if the act is *malum prohibitum* only, and one which the muncipaility clearly has the power to punish for its local protection or benefit, then a prosecution by one should not bar a prosecution by the other. To this latter class belongs the principal case, and the court assumes, rather than decides, the existence of the right. We know of no Virginia case which either assumes or decides such right in case of an offence *malum in se*. On principle, it would seem that the distinction above taken is sound, but we know of no authority for it.

In Virginia we have no Constitutional guaranty against a second jeopardy. It is left wholly to the Common Law right of exemption, which is preserved to us by section 2 of the Code, and to sections 3893 and 3894 of the Code. Section 3893 declares: "A person acquitted by the jury upon the facts and merits on a former trial, may plead such acquittal in bar of a second prosecution for the same offence, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted." No provision is made for an acquittal before a Justice of the Peace or in any other way than *by the verdict of a jury*. The statute has no application to cases of *nolle prosequi* entered by the attorney for the Commonwealth in the midst of the trial, nor to convictions in any case. All such cases are controlled by the Common Law, preserved to us by section 2 of the Code, as stated above. In cases to which the statute applies it is more liberal than the common law, in that it guarantees the protection, although the verdict was found in a case in which the indictment was defective *in substance*. It is singular though that this State should have left this whole subject to the discretion of the legislature. The Constitution of the United States (Amendment V), and the constitutions of many of the States guarantee against a second jeopardy, and we are surprised not to find a similar guaranty in Virginia. There is no constitutional reason why the legislature of Virginia may not allow the State a writ of error *in all criminal cases*. It is allowed in two classes of cases, to-wit: (1) Cases relating to the State revenue, and (2) for the violation of a law declared by the trial court to be unconstitutional. Suppose, then, a party is arrested, tried, and *found not guilty* "by the jury on the facts and merits" under a law relating to the State revenue, and the State appeals and the jugment is reversed, *can he be tried a second time for the same offence?* If we look solely to section 3893 of the Code, plainly not. But we are to read the Code as a whole, as one act, and construe all of the sections together and render them harmonious, if possible. What then must be the result? Three different views suggest themselves to us as possible solutions. *First*, a verdict is no verdict which has been set aside by an appellate court. *Second*, section 4052 of the Code must be construed as an exception to section 3893, so as to make the verdict conclusive in all cases except those relating to State revenue or involving the constitutionality of an act. *Third*, giving full force and effect to every word of each section, while there may be a writ of error in favor of the State, the accused can never be tried again for that offence.

The objection to the first position is that it is contrary to the whole spirit of our laws or of our ideas of justice that a citizen should be subjected to a long and expensive trial, resulting in acquital "by the jury upon the facts and merits" and then have no benefit therefrom, simply because it affects the revenue of the State. To convict of a criminal offence the act complained of must be not only within

the letter of the law, but within its spirit. *Church of the Holy Trinity v. U. S.*, 143 U. S. 547. The prime object of such laws is to *obtain revenue*, not to punish the citizen, or to uphold some law which an inferior court has declared unconstitutional. Suppose the conviction be for violation of a law imposing a collateral inheritance tax. Manifestly the object is to get revenue. An inferior court might declare the law to be unconstitutional and the State would thereby lose the whole revenue to be derived from the act, if other courts followed in its lead. If they did not, then a different law would be enforced in part of the State from that enforced in another. So, in order to settle the question, a writ of error is allowed to the State. Now manifestly the object is *to save revenue* and not merely to create a new class of crimes. Hence, when the appellate court declares the act constitutional, it can be enforced in all other cases except the particular one under consideration. It cannot be enforced here because section 3893 forbids it. While the effect of this is to make the appellate court decide a moot question, so far as it affects the particular case, it is not moot as to all cases to be controlled by it, and there is no reason why the legislature may not impose this duty on the court if it sees fit to do so. The legislature has power, if it sees fit to exercise it, to declare that in all prosecutions for rape a writ of error shall lie for the Commonwealth. Here, as there could be no other motive except to secure a second trial of the accused who had been acquitted, the court might find itself *compelled* to hold that a second trial should be had, although it would shock the Commonwealth, but surely there can be no such necessity in the enforcement of law enacted for the purpose of revenue only.

The objection to the second position is that it does not give full force and effect to every word of each section. Sec. 3893 contains no exceptions whatever, and if a reasonable construction can be given to sec. 4052 so as to make it harmonize with sec. 3893 and make no exception, it should be done. Such we think can be done.

The third and last position is to give full force and effect to every word of each section. The effect of this is to guaranty *in all cases* protection against a second trial, where the accused was "acquitted by the jury on the facts and merits on a former trial." Give the State the right of appeal where the law relates to State revenue or the constitutionality of an act, and let her right herself in all other cases, but say to her you can never try this man again for that offence. "A new trial can in no case (unless, perhaps, in case of fraud by the accused) be awarded the Commonwealth, because it is said that would be to put the accused in jeopardy a second time, contrary to the established maxim." Minor's Syn. Crim. Law, 295. Undoubtedly this was the Common Law Rule, and if a different rule is to be established in Virginia it should be done *plainly*. The only objection to this position is that it makes the court decide a somewhat moot question. But, with power to the legislature to impose such a duty on the courts, it is not to be presumed that they will shrink from discharging it, or will place the liberty of the citizen beneath the labors of the courts, or even a supposed infringement of their dignity. Of the three views presented above we strongly incline to the last.

We have examined all the cases cited to section 3893 and others beside. In none of them was the question here raised either decided or discussed. A brief review of them will show this.

In *Commonwealth* v. *Harrison*, 2 Va. Cas. 202, it was simply held that no writ of error lies for the Commonwealth in a criminal case. This case arose before the

present statute. In *White* v. *King*, 5 Leigh 726, a writ of error was sued out by the defendant and not by the Commonwealth. In *Abrahams* v. *Commonwealth*, 11 Leigh, 675, the writ of error was applied for by the defendant and refused for want of jurisdiction of the court. In *Commonwealth* v. *Hampton*, 3 Gratt. 590, the defendant demurred to the indictment and the demurrer was sustained. To this judgment a writ of error was awarded. *There was no verdict against the prisoner. Commonwealth* v. *Hill*, 5 Gratt. 682, was identical with *Commonwealth* v. *Hampton*, and the same is true of *Commonwealth* v. *Hatcher*, 6 Gratt. 667. In *Commonwealth* v. *Scott*, 10 Gratt. 749, there was a verdict and judgment in the County Court against the defendant. He appealed to the Circuit Court, which reversed the judgment of the County Court, and the Commonwealth appealed from the judgment of the Circuit Court. The same state of facts existed in *Commonwealth* v. *Lewis & Diviney*, 25 Gratt. 938. In *Iverson Brown's Case*, 91 Va. 762, there was a demurrer to the indictment, which the County Court sustained. Upon a petition by the Commonwealth to the Circuit Court the judgment of the County Court was affirmed, and thereupon the Commonwealth sued out a writ of error from the Court of Appeals. Thus far it will be observed that in none of the cases mentioned was there a verdict of *not guilty*. In *Coe's Case*, 9 Leigh 620, there was a verdict of *not guilty* and the Commonwealth applied for a writ of error, but it was refused on other grounds than the right of the Commonwealth to apply. It was stated, however, in the opinion that it was one of the class of cases in which the Commonwealth had the right of appeal. In *Myer's Case*, 92 Virginia 809, there was a verdict of not guilty, and from the judgment entered thereon, the Commonwealth applied for and obtained a writ of error. Upon the hearing of the writ of error the judgment of the Hustings Court of the city of Richmond was affirmed, but the question did not arise which we are here discussing. It is conceded that the court had jurisdiction of the appeal under section 4052. If, however, the Court of Appeals had reversed the judgment of the Hustings Court and the case had been remanded for a new trial, the question would have been squarely presented if Myers had pleaded the former verdict in discharge of further prosecution. We presume had the judgment been one of reversal the order would have been that the verdict be set aside and the judgment of the Hustings Court reversed and annulled. When put upon trial Myers would have pleaded the former verdict and vouched the records of the Hustings Court. Thereupon the Commonwealth would have produced the opinion and judgment of the Court of Appeals in order to show that notwithstanding the fact that there was a verdict that verdict had been set aside. If the court had taken the first view herein before mentioned it would have held the verdict was no verdict at all and would have proceeded with the second trial. If, however, the court had entertained the third view herein before mentioned it would have given full force and effect to section 3893 of the Code and would have sustained the plea of former acquittal by the jury on the facts and merits of the case. These several views have already been sufficiently discussed. We need only add that when the verdict of a jury is received and entered of record it remains of record in the trial court notwithstanding any action which may thereafter be taken by the appellate court, and that when the defendant had pleaded the former verdict of acquittal he would have brought himself within the very letter of the statute which provides that it should bar a second trial. Of course there is room for wide difference of opinion on this subject and it is a matter which can only be settled by the Court of Appeals whenever the question shall arise.

In the principal case on the appeal from the police justice the case was heard and decided by the Hustings Court of the city of Roanoke without the intervention of a jury, and no question seems to have been raised as to the right of the city of Roanoke to appeal. Unless there is some provision, however, in the charter of the city of Roanoke which allows the appeal in this class of cases we do not understand how the city's case ever got into the Hustings Court. Usually the defendant in such cases is allowed to appeal where there is a judgment against him, but it is not customary to allow the municipality to appeal unless there is some special provision to that effect. Certainly, the language of section 4052 does not confer any such right of appeal on the municipality. No question, however, was raised in either court on this subject.

The general subject of jeopardy cannot be discussed in a brief note like this, but we cannot forbear to make the following quotation from a note to 48 Amer. St. Rep. 214, as bearing upon the points above alluded to: "The law almost universally prevalent is that a verdict of acquittal in a criminal case is final and conclusive, and that there can be no new trial of a criminal prosecution after an acquittal in it: *People* v. *Corning*, 2 N. Y. 9; 49 Am. Dec. 364, and note, showing that, by the just interpretation of that provision of the statute which gives to the poople the right of appeal in criminal cases, it must be confined to those cases in which errors in the proceedings may occur before legal jeopardy has attached to the accused. The law that no appeal can be taken by the people in a criminal case has been changed by statute in some of the States: Note to *People* v. *Corning*, 49 Am. Dec. 368; monographic note to *State* v. *Solomons*, 27 Am. Dec. 478, on whether a verdict of acquittal can be set aside; but, generally speaking, such statutes do not authorize a judgment of acquittal to be stayed, reversed, or otherwise affected by the State's appeal. Such an appeal seems to be designed merely for the purpose of correcting errors prejudicial to the due and uniform administration of criminal law—to determine the law for future guidance. It seems, also, that questions of law only are to be reviewed on the appeal, and that the State cannot appeal where the question is one of fact; and it is quite clear that, where there is a provision in the constitution of a State that no person shall, after acquittal, be again tried for the same offence, a statute giving the prosecution a right of appeal after acquittal on a valid indictment or information is utterly void: See monographic note to *State* v. *Solomons*, 27 Am. Dec. 478, 479. It seems clear, in the light of all authority on the subject, that, in the absence of an expressed provision of the statute authorizing it, no appeal ought to be allowed on the part of the State, when the accused has been tried and acquitted, except for the purpose of future guidance as to questions of law. In the absence of statute, a verdict of acquittal is final, whether it be due to a misdirection of the judge on a question of law, a mistake of the jury, their refusal to obey the instructions of the court, erroneous instructions, disregard of the evidence, or any other like cause. It can never afterwards, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted on any ground except, possibly, that of fraud: Note to *State* v. *Solomons*, 27 Am. Dec. 472, 474." M. P. BURKS.